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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 264

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

RESPONDENT'S MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OUT OF TIME

And

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

EUGENE J. McGIVNEY,
New Orleans, Louisiana,
Counsel for Respondent.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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Comes now the respondent, Pan American Life Insurance Company, by its attorney, Eugene J. McGivney, and respectfully moves this Honorable Court for leave to file the accompanying Respondent's Brief in Opposition to Petition for a Writ of Certiorari herein out of time, and as cause therefor, respondent avers as follows:

On April 20, 1940, the United States Circuit Court of Appeals for the Fifth Circuit entered judgment in the above-entitled cause in favor of the respondent; and on

July 22, 1940, the petitioner filed a petition for a writ of certiorari in this Court. The reasons assigned by the petitioner for granting the writ were: (1) that the decision below is in direct conflict with the decision of the Court of Claims in *New World Life Insurance Company v. U. S.*, 26 Fed. Supp. 444, 460, now pending in this Court on certiorari, No. 2, October Term, 1940; and (2) that it also is in conflict in principle with certain decisions of this Court, viz: *Helvering v. Illinois Ins. Co.*, 299 U. S. 88; *Helvering v. Inter-Mountain Ins. Co.*, 294 U. S. 686. Cf. *New York Life Ins. Co. v. Edwards*, 271 U. S. 109, 119; *United States v. Boston Ins. Co.*, 269 U. S. 197; *McCoach v. Ins. Co. of North America*, 244 U. S. 585. (Pet., 8, 9).

According to Par. 3, Rule 38 of this Court, the respondent had until August 11, 1940, within which to file a brief in opposition to the granting of said petition for a writ of certiorari. The respondent did not file any brief in opposition within the time prescribed by the Rule, because the only meritorious reason assigned by the petitioner for the granting of the writ was that the decision of the court below is in direct conflict with the decision of the Court of Claims in the *New World Life Insurance Company* case.

On September 24, 1940, however, the Solicitor General filed a motion on behalf of the United States to dismiss the writ of certiorari in the *New World Life Insur-*

ance Company case on the ground that the question presented by the writ is moot. The Solicitor General's said motion contained a statement that this Court would "undoubtedly wish to consider whether there will remain any basis for certiorari in that case (the Pan American case), if it grants our motion to dismiss in the instant case (the *New World Life Ins. Co.* case)." (Solicitor General's Motion in *New World Life Ins. Co. v. U. S.*, No. 2, October Term, 1940, p. 5, fn. 3).

Respondent submits that the other reason assigned by the petitioner for the granting of the writ herein, that the decision below conflicts in principle with the decisions of this Court referred to above, is not meritorious; and that the petitioner's contention in this respect has been disposed of not only by the decision of the court below, but also by the decisions of the United States Circuit Courts of Appeals for the Ninth and First Circuits, respectively, in *Com. v. Oregon Mutual Life Ins. Co.*, 112 Fed. (2) 468, and *Com. v. Monarch Life Ins. Co.*, 113 Fed. (2) ___, both of which are in complete harmony with the decision of the court below.

The Solicitor General did not file his motion to dismiss the writ in the *New World Life Ins. Co.* case during the period granted by the rules of this Court within which respondent was permitted to file a brief in opposition to the petition for a writ of certiorari in the instant case. The respondent had no knowledge of the filing of said

motion to dismiss the writ in that case until sometime after it was filed in this Court on September 24, 1940. The respondent has prepared the within motion and the accompanying brief in opposition to the granting of the writ herein as expeditiously as possible after receiving knowledge of the filing of the Solicitor General's said motion.

WHEREFORE, respondent prays that its motion to file the accompanying brief in opposition to the granting of the writ herein may be granted.

EUGENE J. McGIVNEY,
New Orleans, Louisiana,
Counsel for Respondent.

October, 1940.

In the
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No. 264

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the court below (R. 32-60) is reported in 111 Fed. (2d) 366.

Jurisdiction.

The jurisdiction of this Court is set forth in the petition for a writ of certiorari herein. (R. 2).

Question Presented.

The question presented is stated in the petition for a writ of certiorari (p. 2).

Statutes and Regulations.

The statutes and regulations involved are printed in the petition for a writ of certiorari (pp. 10-16).

Statement.

A statement of the case is made in the petition for a writ of certiorari (pp. 2-7).

Reasons for Denying the Writ.

1. The petitioner assigns as a reason for granting the writ that the decision below is in direct conflict with *New World Life Insurance Company v. U. S.*, 266 Fed. Supp. 444, 460, now pending on certiorari in this Court, No. 2, October Term, 1940. On September 24, 1940, the Solicitor General filed a motion in said case to dismiss the writ on the ground that the question presented by it is moot. In the event that this Court should grant the Solicitor General's motion and dismiss the writ in the *New World Life Insurance Company* case, and also reverse the Court of Claims in accordance with the established practice of this Court in such cases (*Leader v. Apex Hosiery Co.*, 302 U. S. 656; *Woodring v. Clarksburg Bridge Company*, 302 U. S. 658; *Alejandrino v. Quezon*, 271 U. S. 528; *Brownlow v. Schwartz*, 261 U. S. 216, 218; *Heitmuller v. Stokes*, 256 U. S. 359; *Commercial Cable Co. v. Burleson*, 250 U. S. 360; *Public Utilities Comrs. v. Compania General de Tabacos*, 249 U. S. 425; *Berry v. Davis*, 242 U. S. 468, 470; *U. S. v. Hamburg Amerikanische Co.*, 239 U. S. 466), there will be no decision of the Court of Claims or of a United States Circuit Court of Appeals in conflict with the decision below. In fact, there are two other decisions

of United States Circuit Courts of Appeals, *Com. v. Oregon Mutual Life Ins. Co.* (9th), 112 Fed. (2) 468, and *Com. v. Monarch Life Ins. Co.* (1st), 113 Fed. (2) __, decided since the court below rendered its decision in the instant case, which are in agreement with the decision of the court below.

2. The other reason assigned by the petitioner for the granting of the writ is that the decision below conflicts in principle with the decisions of this Court in *Helvering v. Illinois Ins. Co.*, 299 U. S. 88; *Helvering v. Inter-Mountain Ins. Co.*, 294 U. S. 686. Cf. *New York Life Ins. Co. v. Edwards*, 271 U. S. 109, 119; *United States v. Boston Ins. Co.*, 269 U. S. 197; *McCoach v. Ins. Co. of North America*, 244 U. S. 585. (Pet., 8, 9). None of these cases involves the question of whether reserves required by state laws to be maintained by life insurance companies for the payment of disability benefits under policies of combined life, health, and accident insurance constitute "reserve funds required by law" within the meaning of Section 203 (a) (2) of the Revenue Act of 1932 or of any other revenue act. The court below and the courts in *Com. v. Oregon Mutual Life Ins. Co.* and *Com. v. Monarch Life Ins. Co.*, *supra*, effectively disposed of this contention of the petitioner and held against the Government.

Conclusion.

If this Court should dismiss the writ of certiorari and reverse the Court of Claims in *New World Life Ins. Co. v. U. S.*, No. 2, October Term, 1940, the decision below will not be in conflict with any decision of the Court of Claims or of any United States Circuit Court of Appeals

or of this Court. On the contrary, the decision of the court below will be in accordance with the decisions of the Ninth and First Circuits, respectively, in *Com. v. Oregon Mutual Life Ins. Co., supra,* and *Com. v. Monarch Life Ins. Co., supra.* If this Court should dismiss the writ in the *New World Life Insurance Company* case, petitioner respectfully submits that the petition for a writ of certiorari herein should be denied.

EUGENE J. McGIVNEY,
New Orleans, Louisiana,
Counsel for Respondent.

October, 1940.

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